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No. 91-221

Supreme Court, U.S.
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1991

WALTER W. FISCHER,
PETITIONER,

v.

CITY OF DOVER, NEW HAMPSHIRE,
AND

HEIRS OF SIMON JANETOS, ELIZABETH (DROUIN)
JANETOS, CHRISTINE (JANETOS) McLAIN, EVELYN
JANETOS, JOHN JANETOS, COSTAS JANETOS, PETER
S. JANETOS, DION JANETOS, NICHOLAS JANETOS,
ANGELINE (JANETOS) BANAS,
EDWARD MURPHY AND AHN MURPHY,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW HAMPSHIRE

Reply to Brief in Opposition

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September 10, 1991

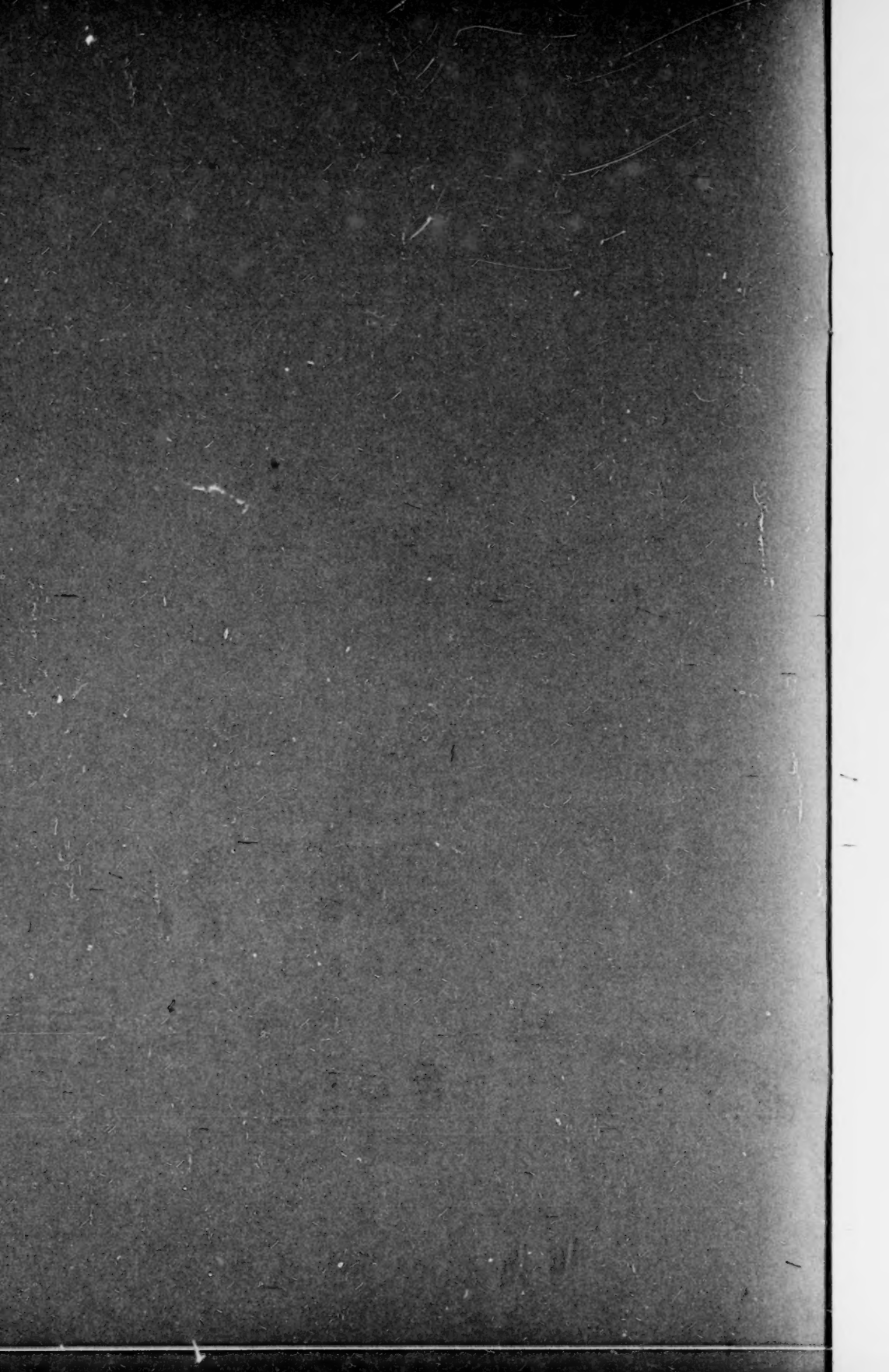


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Argument

UNDER NEW HAMPSHIRE LAW, THE JUDGMENT WAS DUE AND PAYABLE UPON RECEIPT OF THE SUPREME COURT'S MANDATE BY THE SUPERIOR COURT, AND THE PETITIONER WAS ENTITLED BOTH TO DEMAND PAYMENT AND TO EXERCISE HIS RIGHT UNDER 28 U.S.C. § 1257 TO FILE A PETITION FOR CERTIORARI.

The respondent city's argument that the petitioner lost his right under 28 U.S.C. § 1257 to file a petition for certiorari by

demanding and accepting payment of the judgment after its affirmance by the Supreme Court of New Hampshire is groundless.

In the absence of a stay, "obedience to the judgment now here for review" does not render the case moot. *Bakery Sales Drivers Union v. Wagshal*, 333 U.S. 437, 442 (1948). See *Dakota County v. Glidden*, 113 U.S. 222, 224 (1885). Contrast *Thorp v. Bonnifield*, 177 U.S. 15, 18-19 (1900).

Under New Hampshire practice, judgments appealed from the Superior Court to the Supreme Court are ordinarily stayed by rule pending a decision in the higher court. *Rollins v. Rollins*, 122 N.H. 6, 9-10, 440 A.2d 438, 440 (1982). See N. H. Superior Court Rule 74. However, judgments affirmed by the Supreme Court take effect on the date of its clerk's certificate to that effect to the Superior Court, which ordinarily occurs (as it did in this case) within 15 days from the date of the Supreme Court's decision or order. See 5 N. H. Prac., Wiebusch, *Civil Practice and Procedure*, §§ 1852 (at p. 380 n.5), 1857, 2023. See also N. H. Supreme Court Rule 24. There is no provision for any further stay, even when the judgment debtor contemplates filing a petition for certiorari.

In this case, the city had the benefit of the automatic stay during the appeal to the New Hampshire Supreme Court even though the petitioner, as judgment creditor, took the appeal, and the city, as judgment debtor, took no exception to the judgment. But once the judgment was affirmed and a certificate to this effect sent to the Superior Court, the automatic stay expired and the city became obligated to pay the judgment forthwith.

The petitioner was not required, at this point, to choose between demanding immediate payment of the affirmed judgment, or delaying his demand so that he could file a petition for certiorari. He was entitled to do both, as his local counsel pointed out in a letter to the city's attorney dated August 15,

1991, a copy of which is attached as the Appendix (A. 1a-4a). The city's payment of the judgment simply fulfilled its legal obligation under New Hampshire law. Accordingly, the payment could in no way affect, let alone cut off, the petitioner's right under 28 U.S.C. § 1257 to file a petition for certiorari.

Unlike *Cook County v. Malysa*, 39 Ill.2d 376, 235 N.E.2d 598 (1968), relied on by the city, the present case is not one where the city paid a judgment when there was no legal obligation or compulsion to do so.

Conclusion.

For the foregoing reasons, the respondent city's argument that the Court lacks jurisdiction to hear the petition is without merit.

Respectfully submitted,

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September 10, 1991



1a

APPENDIX

HOLLAND, DONOVAN, BECKETT, WELCH & HERMANS

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STEPHEN G. HERMANS

C. JOSEPH GOULD

JOHN W. PERKINS

(1902-1973)

August 15, 1991

Scott Woodman, City Attorney
Office of the City Manager, Legal Division
288 Central Avenue
Dover, New Hampshire 03820

Re: Walter W. Fischer v. City of Dover

Dear Mr. Woodman:

I am writing in response to your telephone call of August 13, 1991 wherein you expressed surprise that Mr. Fischer had filed a Petition for Certiorari in the United States Supreme Court.

Frankly, I do not know why you were surprised. Mr. Fischer, as you know, has consistently made federal constitutional claims in this case which have not been addressed by the New

Hampshire Courts. As a practicing attorney you knew he had a right to file a Petition For Certiorari.

As far as payment of the judgment is concerned, there is no question that the City of Dover owed Walter Fischer at least \$7,758.77 since the date of the first New Hampshire Supreme Court decision. In that decision the Supreme Court held that the City of Dover breached its contract with Mr. Fischer.

The second Supreme Court decision affirmed the trial court's ruling that the City of Dover owed Mr. Fischer \$7,758.77 plus interest. The City of Dover did not appeal the trial court's ruling to the Supreme Court, and therefore it became bound to pay the judgment as soon as the Supreme Court certified its decision to the Superior Court pursuant to Supreme Court Rule 24(1).¹ There is no question but that the City of Dover has owed my client the amount of the judgment plus interest at 10% since the date of certification, whether Mr. Fischer filed a Petition For Certiorari in the United States Supreme Court or not.

It is my understanding that on or about June 21, 1991 you had an informal discussion with my client. I was not privy to this conversation, nor did I have any knowledge of it. My client told me that he had talked to you and had asked you when the City of Dover was going to pay him. You told him it was up to us to request payment. Mr. Fischer wrote me a letter to this effect on June 21, 1991. I enclose a copy.

¹"Orders or decrees of the Supreme Court take effect on the date of the Clerk's certificate to the lower court or agency." 5 New Hampshire Practice § 1753, p. 380, Footnote 5.

Within 15 days after the date of an opinion, the clerk of the supreme court shall forward to the clerk of the lower court . . . a certificate of the order or mandate. . ." New Hampshire Supreme Court Rule 24(1)."

I then wrote you a letter on June 25, 1991. I did not talk to you between June 21 and June 25. In my letter I calculated the interest. I requested that you send a check payable to Mr. Fischer in the total amount of \$10,000.85, send it directly to him in Dover and send me a copy of your letter and check.

I did not hear from you before I went to the Lewis and Clark Wilderness area in Montana for a vacation July 13, 1991. I returned to the office on July 25, 1991. In the meantime, on July 22, 1991 you sent a letter to Mr. Fischer and enclosed the check for \$10,000.85. Copies of your letter and the face of the check were received in my office July 24, 1991. I understand Mr. Fischer had cashed the check by the time I saw the copy of your letter.

Your unilateral, gratuitous, self-serving and improper statement at the end of your letter that “. . . your acceptance of this check will bring this dispute to a close” did not foreclose my client from filing a Petition For Certiorari in the United States Supreme Court. My client then had the absolute right to payment of his judgment. There were no further legal steps the City could have taken to change that right. Mr. Fischer also had the right to file a Petition For Certiorari. If your statement had the purpose of attempting to unilaterally eliminate that right, it fails. It was without consideration. Moreover, my letter of June 25, 1991 made it clear that the *only* authority you had in communicating with Mr. Fischer was to send the check directly to him. You had no right to try to impose upon him, without first contacting me, any conditions relative to acceptance of the check. I was his attorney at the time. We were in litigation. The only thing you were authorized to do was send him the check. You had no right to impose unilaterally any conditions on the negotiation of the check.²

² Frankly, I am surprised the City didn't pay the judgment long before it did since Mr. Fischer was entitled to receive statutory interest at 10% whereas bank rates and short term treasury rates have been running around 6%.

My client had a judgment which your client was bound to pay. Your client paid it. My client also had the right to file a Petition For Certiorari to the United States Supreme Court and he exercised that right. Your sending the check and letter, and my client's cashing the check could not interfere with his right to file a Petition For Certiorari.

I am sending copies of this letter to James Koromilas, Esquire, attorney for the intervenors, Reginald H. Howe, Esquire, co-counsel and to Mr. Fischer. If you have any questions, or wish to discuss this matter further, please do not hesitate to contact me.

Very truly yours,

William H.M. Beckett

WHMB/rmt
F22/F3
Enclosures

cc: Mr. Walter Fischer
James Koromilas, Esquire via fax and regular mail
Reginald H. Howe, Esquire

